IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 19, 2007 Session

MELINDA ANDERSON, ET AL. v. BRETT WILDER, ET AL.

Appeal from the Circuit Court for Knox County
No. 2-778-01 Harold Wimberly, Jr., Judge

No. E2006-02647-COA-R3-CV - FILED SEPTEMBER 17, 2007

This case involves a dispute between members of FuturePoint Administrative Services, LLC ("FuturePoint"), a limited liability company. Plaintiffs sued Defendants after being expelled by Defendants from FuturePoint by vote. Plaintiffs received a buyout price of $150 per ownership unit for their shares and shortly after the expulsion, Defendants sold those ownership units to a third party for $250 per unit. Plaintiffs sued alleging, among other things, that Defendants had violated their fiduciary duty and duty of good faith to Plaintiffs. Defendants argued, in part, that their actions were authorized by FuturePoint's operating agreement. After a jury trial, judgment was entered in favor of Plaintiffs and Plaintiffs were awarded damages plus pre-judgment interest totaling $98,895.36. Defendants appeal raising issues regarding the Trial Court's denial of a motion for directed verdict; an alleged lack of evidence regarding the actions of Defendants Dee Dee Wilder, Anna Stout, and Kelly Welles; the imposition of pre-judgment interest; and allegedly erroneous jury instructions. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

William S. Lockett, Jr., and Rob Quillin, Knoxville, Tennessee for the Appellants, Brett Wilder, Dee Dee Wilder, Michael E. Cox, Dorman Lamarr Stout, Anna Stout, Timothy Welles, Kelly Welles, Dennis Freeman, and Rhonda Shockley.

Brian C. Quist, Knoxville, Tennessee for the Appellees, Melinda Anderson, Alan B. Zimmerman, Cherry W. Zimmerman, Charles F. Quade, Janine R. Quade, William Thompson & Associates, Inc., Michael A. Atkins, Sherry Lynn Turner, and Patrick L. Martin.

OPINION

Background

Given the history of this case, an extensive discussion of the background of the case including the evidence presented to the jury is necessary. This case is now before us on appeal for the second time. Our Opinion in the first appeal ("*Anderson I*"), discussed in some detail the facts underlying the parties' dispute stating:

> FuturePoint Administrative Services, LLC, was created by the parties on or about January 1, 2000, at which time they executed the operating agreement for the company. FuturePoint commenced the business of administering third party medical claims in early 2000. Ownership of the company was divided into "ownership units." One ownership unit amounted to one-tenth of one percent ownership of the company. The ownership interest, and amount of capital contributed for the startup of FuturePoint, of each party is illustrated in the following chart:

Member Name	Ownership Interest	Capital Contributed
William Thompson & Associates, Inc. (Plaintiff)	100 units (10%)	$ 15,000
Charles and Janine Quade (Plaintiffs)	100 units (10%)	$ 15,000
Michael Atkins and Sherry Turner (Plaintiffs)	100 units (10%)	$ 15,000
Patrick L. Martin (Plaintiff)	100 units (10%)	$ 15,000
Alan and Cherry Zimmerman (Plaintiffs)	40 units (4%)	$ 6,000
Melinda Anderson (Plaintiff)	30 units (3%)	$ 4,500
Brett and Dee Dee Wilder (Defendants)	200 units (20%)	-0-
Michael E. Cox (Defendant)	100 units (10%)	$ 15,000
Lamar[r] and Anna Stout (Defendants) [1]	100 units (10%)	$ 15,000
Timothy and Kelly Welles (Defendants)	100 units (10%)	$ 15,000
Dennis Freeman and Rhonda Shockley (Defendants)	30 units (3%)	$ 4,500

> As can be seen from the chart, each member contributed $ 150.00 per ownership unit, with the exception of Defendants Brett and Dee Dee Wilder.

FOOTNOTES

1 Anna Stout was incorrectly identified in the complaint as "Susan Stout." Lamarr Stout, her husband, stated in his deposition that his wife goes by the nickname Susie, which presumably was the source of the error.

The parties set up FuturePoint as a member-managed LLC. The operating agreement provides for a management committee "to oversee and manage the business operations of the Company." The operating agreement gives the management committee the power and authority to contract on behalf of the company by a majority vote. FuturePoint's management committee was comprised of Plaintiffs Michael Atkins, Charles Quade, and Bill Thompson, and Defendants Lamarr Stout and Brett Wilder.

On September 10, 2001, a members' meeting took place at the FuturePoint offices, at which two offers to purchase ownership units were discussed. Each offer was at a price of $ 250.00 per ownership unit. At this time, FuturePoint had generated an amount of excess cash on hand in the amount of $ 63,000.00.

On September 14, 2001, the following actions were taken by the Defendants, as shown by a document styled "Actions taken by written consent of the members of FuturePoint Administrative Services, LLC":

> In lieu of a meeting of the Members of FuturePoint Administrative Services, LLC (the "Company"), a Tennessee limited liability company, in accordance with the provisions of Section 48-233-101 of the Tennessee Limited Liability Company Act and Article 8.10 of the Operating Agreement of the Company, Members holding a majority of Units and who own Governance Rights with voting power
> equal to the voting power that would be required to take the same action at a meeting of the Members at which all Members are present hereby take the following actions:
>
> The following Resolutions are hereby adopted by vote of the aforesaid Members:
>
> RESOLVED, pursuant to Article 13.6 of the Operating Agreement of the Company, the following Members are hereby expelled from the Company effective as of the date hereof:
>
> William Thompson & Associates, Inc.

Mike A. Atkins and/or Sherry Lynn Turner

Patrick L. Martin and/or Deborah N. Martin

Charles F. Quade and/or Janine R. Quade

Melinda Anderson and/or Adam & William Derreberry

Alan Zimmerman and/or Cherry W. Zimmerman

RESOLVED FURTHER, pursuant to Article XVII of the Operating Agreement of the Company, the Operating Agreement is hereby amended to delete in its entirety, Article IX and the Management Committee created thereunder; such functions previously conducted by the Management Committee to be hereafter conducted by the Chief Manager, Brett Wilder.

RESOLVED FURTHER, pursuant to Article X of the Operating Agreement, Charles F. Quade is hereby removed as Secretary of the Company and Lamarr Stout is hereby elected as Secretary of the Company.

Pursuant to the terms of the operating agreement, the remaining members of the company bought the ownership interests of the expelled members at a price of $150.00 per membership unit.

On October 11, 2001, the remaining members of FuturePoint sold a total of 499 membership units to a Don Allen at a price of $ 250.00 per unit.

The Plaintiffs brought this action on December 17, 2001, alleging breach of fiduciary duty and breach of the statutory and common law duty of good faith and fair dealing. Defendants moved for summary judgment, arguing that their actions were expressly permitted under the operating agreement, and that they acted in good faith in expelling the Plaintiffs. Specifically, Defendants relied upon the following provision of the operating agreement:

> 13.6 Expulsion of a Member. The Company may expel a Member, with or without cause, from the Company upon a vote or written consent of the Members who hold a majority of Units. In the event of a Member's expulsion, the remaining Members shall be obligated to purchase the expelled Member's Financial Rights at the Agreed Price and on the Agreed Terms within thirty (30) days of such expulsion. The remaining Members shall purchase the expelled Member's

> Financial Rights in proportion to their Financial Rights (excluding the Offered Financial Rights), or in such other proportion as they may agree.

Anderson v. Wilder, No. E2003-00460-COA-R3-CV, 2003 Tenn. App. LEXIS 819, at **2-7 (Tenn. Ct. App. Nov. 21, 2003), *no appl. perm. appeal filed*.

In *Anderson I*, we vacated the grant of summary judgment and remanded the case for trial finding and holding, *inter alia*:

> [W]e are of the opinion that finding a majority shareholder of an LLC stands in a fiduciary relationship to the minority, similar to the Supreme Court's teaching in *Nelson* regarding a corporation, is warranted in this case. Such a holding does not conflict with the statute, and is in keeping with the statutory requirement that each LLC member discharge all of his or her duties in good faith.
>
> * * *
>
> We find that there exists a genuine issue of material fact regarding whether the Defendants' actions in expelling the minority Plaintiffs were taken in good faith, as required by the LLC Act, or whether they expelled Plaintiffs solely in order to force the acquisition of their membership units at a price of $150.00 in order to sell them at $250.00 per unit, in violation of their fiduciary duty.
>
> In addition, there is a legitimate issue raised as to whether the sale of Mr. Freeman and Ms. Shockley's ownership units to Mr. Wilder violated the operating agreement, as alleged by Plaintiffs. The operating agreement contains the following provision regarding the transfer of financial rights in the company:
>
> > 13.3 Voluntary Lifetime Transfers. No Member may make a Voluntary Lifetime Transfer of Financial Rights except pursuant to this Section. Any Member who wishes to make said Voluntary Lifetime Transfer must promptly send a notice to each other Member. Such notice shall include a description of the proposed Transfer, the price and terms on which the Financial Rights are to be Transferred, the name, address and business or occupation of the proposed transferee, and any other facts that are, or would reasonably be deemed to be, material to the proposed Transfer. The Member wishing to make a Voluntary Lifetime Transfer shall be deemed to have offered to sell his or her Financial Rights otherwise to be

> transferred to the other Members. The other Members shall have the option to buy the Offered Financial Rights at either (a) the price and terms set forth in the notice of proposed Transfer or (b) at the Agreed Price and on the Agreed Terms. Each other Member shall have sixty (60) days from such notice in which to elect to buy all or any portion of the Offered Financial Rights. The other Members may elect to buy the Offered Financial Rights in proportion to their respective Financial Rights (excluding the Offered Financial Rights), or in such other proportion as they may agree.

> It is not clear from the record whether Plaintiffs were given any opportunity to purchase the membership units and financial rights of Mr. Freeman and Ms. Shockley. There is nothing in the record to suggest that they were offered this opportunity, and Plaintiffs' brief argues that they were not. There thus exists an issue of whether the sale of Mr. Freeman and Ms. Shockley's financial rights to Mr. Wilder comported with the terms of the operating agreement.

Anderson I, 2003 Tenn. App. LEXIS 819, at **17-18, **27-29.

Upon remand, a trial was held before a jury in March of 2005, but the jury was unable to reach a unanimous verdict and the Trial Court declared a mistrial. The case proceeded to trial before a jury for the second time in July of 2006. Plaintiff Charles Quade testified at trial. Mr. Quade and his wife owned 10% of FuturePoint, and Mr. Quade was FuturePoint's vice-president. Mr. Quade testified that in May of 2001, he wrote a memo to Defendant Brett Wilder, FuturePoint's president, stating that in order to comply with HIPPA "[FuturePoint] could partner with somebody that already has [the required computer capabilities], maybe bring in some other investors to capitalize the company…." Mr. Quade testified that FuturePoint's management committee held a meeting on May 31, 2001 during which:

> we also talked about a meeting that Brett, Bill and I had with another person who owns some TPAs, third party administrative firms.
>
> We had a meeting with him, because he had expressed an interest in buying some ownership in our company,….Joe Crowley of Health Care Economics Group. That was the name of his organization. He's - - as he states, it's a preliminary letter of intent to purchase a majority stake in Futurepoint.…Brett's opinion - - Brett stated to us that Joe was wanting a majority interest, which means more than 50 percent, and he was confident that 60 percent of the company wouldn't want to sell their shares so we, you know, we shouldn't even be entertaining that idea.…And that's when he notified to me or notified to us at that meeting that everybody was present

> at the management committee that there was also - - that he had an offer from a Don Allen in Tulsa, Oklahoma, that he was interested in buying into the company. So he also shared that offer to us, and we now had two offers to consider.

Mr. Quade testified: "the management committee did, we discussed - - we did, we talked about that expulsion agreement and how, you know, that's a possibility that we could - - certain members could be expelled from the company, we could sell these shares to Don Allen." He stated:

> If you expelled the - - if the members were expelled, the contract says you will get your initial investment back, and Don Allen later on was willing to pay more than that initial capital contribution and, you know, me personally after that meeting we discussed it, you know, we had to think about that.
>
> And I thought, gee, that doesn't seem very ethical to me, to take - - you know, to expel somebody, give them their - - me, myself, my particular situation, give me my $15,000 investment back, and not let me sell it to Don Allen at 25,000, and not let me have that opportunity.

After this meeting, Mr. Wilder put together a spreadsheet ("the Spreadsheet") showing what the potential ownership interests would be after the sale. Mr. Quade testified that the Spreadsheet:

> shows the members' interest. Well, it first shows the capital purchase price, in other words, what would invoking the expulsion provision, what would it cost to expel those members, and then what we would sell them for, and then there is a difference of an amount of money, and then that shows how it would be reallocated to the remaining members and how they would net a dollar amount, and we'd also increase a little bit in a percentage of ownership.

Mr. Quade testified:

> I thought about it over the next few days, and I indicated to Brett that I would not be willing to do this, that I, you know, I specifically told him I didn't think it was ethical, and I didn't want to do that. And really that's - - which hurt our relationship, I think, from that point on.

Mr. Quade recommended that all of the FuturePoint members be made aware of the offers.

FuturePoint did not have a members' meeting in June, July or August of 2001. A members' meeting was held on September 10, 2001. The two offers were presented to the members at the meeting. At that time, FuturePoint was making an approximate monthly profit of $6,000 and had accumulated around $63,000 in cash in the operating account. Mr. Quade testified that at the September 10, 2001 meeting, the offers were discussed and:

> In general there were about - - we were at loggerheads with 50 percent of the company was thinking one way, 50 percent was thinking the other way. We were kind of at loggerheads, and we also discussed that $63,000, that whatever members that decide to sell, whichever offer to sell their shares, should they be entitled to money that the profits that were made up until that point, you know, of that $63,000.
>
> We talked about that. And agreed upon having a management committee meeting on Wednesday to discuss the $63,000, because that was the management committee's responsibility, and the meeting was actually cut short because the power went off that night, and we were back in the kitchen in our office, and we had to use like lighters to get out of the building, so it just kind of ended abruptly that night.

At the September 10, 2001 members' meeting, Mr. Wilder introduced a motion to approve the proposition that Don Allen could purchase the shares of any willing members for $250 per unit with any selling members to sell all shares they held and with Don Allen not to purchase more than 499 units so he would not gain majority control of FuturePoint. The members voted not to accept Don Allen's offer at that time. Mr. Quade testified that they wanted to wait for the management committee meeting to find out what would happen to the $63,000 first.

Originally the management committee meeting was scheduled for September 11, 2001, but was rescheduled for September 14, 2001, due to world events. On the morning of September 14, 2001, Mr. Wilder asked Mr. Quade to prepare financial statements and a balance sheet for the management committee meeting.

Mr. Quade testified that when the time came for the management committee meeting, he went to the kitchen where the meeting was to be held and Mr. Wilder handed him papers that told Mr. Quade he was expelled as a member and fired from his job. Mr. Quade later admitted that he may not actually have been fired, but that after he was given the papers:

> I was so upset and all I just couldn't believe this all happened and I left. I had to get out of the building. I was angry.
>
> And I left and we went over to - - I when to Mr. Atkins' office. We just - - to talk about it. I just couldn't believe this happened. I was in shock, I mean.

Mr. Quade testified that when he returned to the building "I learned all the passwords and everything on my computer were changed. I mean it was obvious I was fired."

Mr. Quade further testified that in addition to the expulsion action, Defendants had taken action to disband the management committee and vest all management functions in Mr. Wilder.

Mr. Quade testified regarding the allegation that Defendants' actions were taken in response to an alleged threat to disburse the $63,000 stating:

> The concern was, and you've heard this, I think, by the other attorney this morning, the $63,000 in the bank, the concern was that the company wouldn't be able to function if that money was disbursed, you know, the company, you know, we won't meet payroll Friday, you know, we wouldn't be able to pay our rent and so forth.
>
> We were making $6,000 more a month than - - we were making money. So even if we didn't have that $63,000 that was savings, if you will, we didn't need that to operate on a monthly basis. We had plenty of money to pay the rent and payroll, and I was on the payroll.
>
> I wouldn't vote to do something so I wouldn't get a paycheck on Friday. You know, I worked real hard for 18 months in this company and walked away with absolutely, you know, walked away without benefitting, getting a gain from my being able to sell my share.
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> * * *
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> The management committee had the authority to disburse money to members, a member's draw is what it's referred to , and some of that money, all of that money, could have been disbursed and it, you know, could have been none.
>
> It could have been a dollar. It could have been $63,000. That's why we had to have the meeting to discuss it.

Not all of the members who were expelled were on the management committee.

During this lawsuit, Mr. Quade learned that the Freeman/Shockley interest was purchased for $333 per unit. Mr. Freeman and Ms. Shockley had accepted the offer to purchase their units on September 14, 2001.

The membership interests taken from the expelled members then were sold to Don Allen for $250 on October 11, 2001. In March and April of 2002, FuturePoint made distributions totaling $53,000 of its profits to the then members.

Mr. Quade and his wife received $150 per unit for their units after being expelled. Mr. Quade testified: "The value of my unit at that time would have been somewhere between $303 per unit and $333 per unit." Mr. Quade's asserted range of valuation is based upon the fact that if the Quades had been able to accept the Don Allen offer, they could have received $250 per unit plus $63 per unit as their share of the $63,000 for a price of $313 per unit, along with the fact that Mr.

Freeman and Ms. Shockley were paid $333 per unit for their units sold on the same day that the Quades were expelled.

Portions of Mr. Wilder's deposition testimony were read at trial. Mr. Wilder testified:

> During the meeting when we discussed the potential expulsion and the guilt by association topics, during that meeting we were brain storming, all of us about what we would do and we realized it was a more complicated thing that we envisioned, expulsion of someone and we were discussing various scenarios of wait a minute, when you do that, how do you know that in an LLC, I mean we had an agreement there, we were reading, we were saying, well, you know, those shares would have to become the ownership of persons who aren't expelled.

The following question and answers from Mr. Wilder's deposition also were read at trial:

> A. I don't remember that $50,000 figure, but I do know that during the meeting as we were discussing the scenario we knew that at some point we would be selling interests and if we bought - -
> Q. If you bought low, you could sell high?
> A. In this particular situation that's what this is showing you, yes.

Mr. Wilder testified about the Spreadsheet stating:

> Don Allen had maybe informally or unofficially said I'm interested in a couple of shares and we were thinking, well, we would like him to have them. We would like to sell them to him, and during the meeting as we were trying to work out the math about him offering 50,000, and someone during that meeting, I'm not sure who it was, talked about we would be buying the capital accounts.
>
> It occurred to us there would be a gain involved. What would that be? How would that work? That's what this was illustrating.
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> * * *
>
> [W]hat that column is showing is the results of the sale of those 20 percent shares, how those dollars would be split amongst those persons who sold to Don Allen, what the income would be from that, and this was showing what conceivably each 10 percent interest would gain, $2,000 in this scenario, which is what we were in the meeting talking about, how would it happen.

Mr. Wilder admitted that the Spreadsheet shows that he personally gained an additional 2.86 percent interest in FuturePoint and netted $4,753.24. However, he stated that they did not discuss the expulsion because they were trying to profit. Mr. Wilder testified:

[I]t was something that we discovered during our conversation that, my goodness, if we purchased these shares from these individuals by the terms of this agreement then we knew we didn't want to keep those ourselves.

At that time Mr. Quade and Mr. Thompson were saying, well, we want to bring choice RX, excuse me, Mr. Allen in. At that time I believe the consensus was that that probably would be a good idea.

It was not about trying to make $2,000 or whatever the number is in the column, no. It was not about that, absolutely not or for in my column.

Mr. Wilder testified that his wife Dee Dee is a member of FuturePoint as is Anna Stout and Kelly Wells.

When he was asked why he expelled Cherry Zimmerman even though she was not on the management committee and could not have distributed the $63,000, Mr. Wilder stated: "I made a decision based on - - upon what I thought was in the best interest of the company."

Plaintiff Mike Atkins testified:

When I received the phone call about [the September 10] meeting, I obviously asked what the context of it was going to be, and I was told there were a couple of offers that were floating around that had been discussed that I never heard anything about.

And so I asked could I come a little early and have an impromptu, just management meeting discussion. So I came a few minutes before the general members[']meeting was going to be held so I could just be brought up to speed, because I was not in the main meeting and I wasn't in the other closed door meetings where the spreadsheets were devised and the plan was cooked up about how to kick people out and sell at a higher price.

So I got there, I don't know, about 30, 40 minutes before. It was attended by Charles and Bill and Brett, and they began to tell me about these offers that were out there that were being presented, that there was a Don Allen offer, there was a Health Care offer, and each one was different.

They were for different percentages of the company, and that they had changed apparently numerous times because they had been talking to these groups over the last four or five months, but we had never heard anything about any offers up to this point.

* * *

Well, as we began to talk about the offers, I noticed that the one offer from Crowley or Health Care Associates was for 100 percent of the company. Then it was for 60 percent of the company, varied amounts.

And I asked the question, well, in his offer, what happens to the assets in the company? And the answer I got was, well, if he buys 100 percent of the company he gets all the assets. I said, okay, if he buys a smaller percentage, what happens?

And we were talking at that point as low as 51 percent, that he would be willing to buy as little as 51 percent, and the answer was, well, at this point he's just buying a membership interest. He wouldn't be buying the assets. So he doesn't expect that there would be any assets in the company, that he would just take it on and run the company.

As far as the Don Allen offer goes, Brett stated that there weren't any financial requirements, that there wasn't a minimum capital account or cash or anything, that he was just offering to buy for $250 a unit any units that were available.

* * *

The conversation in that prior meeting was if we're going to sell to one of these groups, what do we [do] with the profits in the company, because each of the offers would have different results, and I was simply asking what are we supposed to do as a company if we sell a percentage of it.

I knew that from my accounting days, I have an accounting degree, that there used to be some laws that if you have a change of ownership in a company, that you have to either close the books or you have to do a short tax year. And, in fact, I think it's in our operating agreement, paragraph 14.3.

Mr. Atkins also testified regarding the allegation that he wanted to disburse the $63,000. He stated:

All throughout this trial I've been accused as being the person that stood up and said I'm going to come in and distribute all the money in the company. That's not exactly right nor would that make any sense.

My largest client was a client of Futurepoint Administrative Services. If I did anything to cause that company to go out of business, I'm going to lose one of my largest clients, and I'm going to get sued by all the members for doing something contrary to it.

But 14.3 says that whenever the company is considering bringing in a new member, that there should be a situation where the management committee is going to have to either close the books and do an accounting and allocate the profits for that tax year or do a short tax year.

And all I was asking in the meeting was how are we supposed to handle our profits in the company and the cash that's there? As a management committee what is our requirements when we evaluate these offers?

And this 14.3 is in same section that talks about when you buy and sell your interest in the company. It specifically says that we're required to evaluate the profits and allocate them to the current members.

* * *

We would have never voted to do anything that would have caused the company financial harm or caused it to go out of business. What we were evaluating is what were we supposed to do when we sell part of the company.

Mr. Atkins testified regarding the members' meeting held on September 10, 2001 stating:

In our situation there were (sic) a straw poll that was taken that night of how many people would be interested in selling to either Don Allen's offer or the other offer, and when we raised our hands 50 percent of us said we'd be interested in selling. We'd be happy to take the $2500 (sic) or either of the two offers that are out there as long as we get our allocation of our profit added back to our accounts, what we're entitled to.

It's what we earned while we were the part owners, because we don't want to allocate it back to the new owner that's coming and going forward.

So the company could either have offered to buy back our shares for the $2500 (sic) per unit plus our part of the profits or we could have made a one time cash distribution to those people that were leaving, and theirs would have been sold. That's what we didn't know.

That's why we wanted to have the management committee meeting to talk about what are the options. How do we handle this type of a transaction. We had never sold an interest in our company.

Mr. Atkins stated: "the management committee needed to meet to discuss what was profit, what's there available, and to talk about the offers that are going to be made available for people to accept."

Mr. Atkins also testified regarding the disbanding of the management committee. He stated:

> The management committee had been disbanded and removed from our operating company, which right there in and of itself eliminates the issue of were they really concerned we were going to distribute cash to ourselves, which you can't legally do without violating your fiduciary responsibility to all the other members, but that took care of it.
>
> If that was truly their only concern when they eliminated the management committee it was done. So obviously the management committee had been eliminated and disbanded, and so we couldn't have a meeting, but then further we were told in this legal document that we had been expelled and that we would be paid per the agreement. And when I said, well, we weren't going to do all this, he said, I don't care, leave, and I was told to get out.

Mr. Atkins was very surprised to learn that Mr. Freeman and Ms. Shockley were paid $333 a piece for their units, "because we were being offered $2500 (sic) by the Allen offer, and if you add our $630 (sic) of cash, that would get our price up to $313 dollars, and they were paid almost an eight to 10 percent premium on top of that at $333 to get the vote." He stated: "They didn't have a majority until they were able to acquire Mr. Freeman's and Miss Shockley's vote, and that's where they gave them the $10,000 or $3,333 (sic) so they would vote in favor of their plan."

As for the allegation that members were expelled due to a perceived threat to disburse the $63,000, Mr. Atkins stated:

> there seems to be this continuing concern that we're going to expel people because they supposedly are going to distribute cash out of the company that were on the management company, and yet Melinda Anderson wasn't on the management. Cherry Zimmerman was not on the management committee. Pat Martin is not on the management committee.

Mr. Atkins also testified regarding the assertion that members were expelled due to potential bad publicity stating:

> [there was talk of expelling members] [b]ased on the pretense that there was some negative or adverse publicity to a business transaction that was going to be related to me as it was told to them.

> What I find curious about that though is the investment in question was one that was sold here in Knoxville, Tennessee, through the Lanrick Group of which I'm a person that worked through there, as did Mike Cox, as did Tim Wells, as did Lamar[r] Stout. We all worked at the company that sold this investment that potentially was going to have the adverse publicity.
>
> So I find it interesting that you would target me or Pat as a group and say, well, those people worked at the company that's going to have some adverse publicity, but now Tim and Mike and Lamar[r], they work there too and sold it, but we're not going to say that they'll be affected by the publicity.…[W]e all had connections to this potential situation. But I don't think any of them cited that as their reason for expelling me.

A portion of the deposition of Defendant Dorman Lamarr Stout, Jr. was read at trial. Mr. Stout testified that even after they disbanded the management committee "[w]e still would have had everybody in the organization that we didn't want in the organization, so it was pretty much down to brass tacks." Mr. Stout asserted that they did not want the Plaintiffs as members of FuturePoint. When he was asked why they did not want the Plaintiffs as members, Mr. Stout stated: "I didn't have a cause. I had Wheaties that morning. It didn't matter. We didn't want them in the organization."

Portions of the deposition of Defendant Dennis Freeman were read at trial. Mr. Freeman is married to Rhonda Shockley. Mr. Freeman testified: "I made it clear to everybody that we were looking to sell out. I didn't care who had control of the company." He further explained:

> I thought the company was stalemated, and we did what we thought was the right thing to do, and that it was my understanding that the expelled members would receive their money back plus some reasonable return on their investment.…I know that that was the case I made to Brett, and I believe that Brett told me he concurred in that and thought that that would take place.

The allegations in Plaintiffs' complaint surprised Mr. Freeman who stated: "I guess this was the first clue that there was probably not good faith within this committee."

When he was asked if he and his wife offered their units to the company prior to selling to Mr. Wilder, as is required under the FuturePoint operating agreement, Mr. Freeman responded only that: "I doubt there was anybody who had ownership in this company that didn't know we wanted out."

Portions of the deposition of Defendant Tim Welles were read at trial. When asked why he voted to expel Plaintiffs, Mr. Welles stated:

> Probably because they were going to disrupt the company, destroy the company, essentially.…Pay all of the cash. I was going to get, like, $6,000 for my interest, in which I invested 15,000.…I wouldn't say all of the cash. I would say pay cash. I don't know exactly the amount, but I think my part would have been somewhere around $6,000.…I don't know how the company could operate after that.

When he was asked how he knew Plaintiffs were going to take these actions, Mr. Welles stated:

> I guess I was told that.…Several people may have told me that. It may have been Lamarr, it may have been Mike Cox, it may have been Brett. It may have been - - I don't know. Whoever told me, I - - you know, I took that information and considered it to be a certain degree valid and made a decision based on that, which again, according to the operating agreement, I can do. The members - - the majority can vote to do things with or without cause.

Defendant Mike Cox testified regarding the September 10, 2001 meeting stating:

> And what I came away from the gist of the meeting is, is that if we would have sold to Mr. Crowley, we could have taken our cash, because all he wanted was a presence in Knoxville. He wanted our clients and a presence in Knoxville. So he would give us $25,000, plus maybe let us keep the cash, so the offer could have been up to $30,000.
>
> Now, Mr. Allen, on the other hand, was not taking majority interest in our company. He was not wanting a presence in Knoxville. He was wanting to be an investor and bring business to us. So if we stripped out all the cash, all right, I can tell you - - it doesn't take an accountant - - if you're paying $250 per unit and 63 of it's cash, if you strip out all the cash, he's going to offer a lot less than $250 a unit.
>
> So we were arguing - - I won't say arguing. We were discussing heatedly about why in the world would you strip out all the cash. And the reason they would strip out all the cash is to force the sale to Crowley. Because if they pulled out all the cash, I would have no choice but to sell to Crowley. Because as Mike Atkins said, "You're not going to cripple the company and bankrupt the company. What you would do is you would strip out all the cash, and then you would be forced to sell to Crowley."
>
> And that's what the game plan was. That was what I saw as their negotiating tactic, was to say, all right, we're going to distribute the cash, and now Mr. Crowley's offer is still on the table.

Mr. Wilder testified at trial about the September 10, 2001 members' meeting. He testified that Mike Atkins and Bill Thompson arrived early for the members' meeting and that they

and Mr. Quade asked Mr. Wilder to have a management committee meeting before the members' meeting, but that they were unable to do this because Mr. Stout was not present and the meeting was not properly called. Mr. Wilder testified that "Mike Atkins [told] me, 'Brett, we've decided, the three of us as members of the management committee, that we're going to disburse all the cash out of the operating account for Future Point." Mr. Wilder held Mike Cox's proxy as Mike Cox was not planning to attend the members' meeting, but after talking to Mr. Atkins, Mr. Wilder called Mike Cox to come to the meeting. Mr. Wilder testified regarding the happenings after Mr. Cox arrived stating:

> Continued heated debates and discussions about this disbursing the cash. And I was talking to Charles Quade, to Mike Atkins, specifically, 'You can't do this. We can't survive this. How am I supposed to make payroll Friday if we disburse all the funds?'
>
> And Mike Atkins' answer to me was 'Brett, you can go to any of the members and ask them to put their money back in.'

Mr. Wilder made a motion at the members' meeting to accept the offer from Don Allen and the motion was seconded, but did not pass. Mr. Wilder explained that between his own votes and the proxies he held, he had 50% of the voting interest that night and that he voted in favor of the motion. Mr. Wilder stated that it was "untrue" that members did not get the chance to sell to Don Allen.

Mr. Wilder also testified further about the Spreadsheet. He stated:

> During that meeting in May, there had been discussions over and over again, actually, over the previous six months, about two of the members who had become embroiled in some sort of a potentially scandalous business venture. And if that broke in the papers, was there going to be publicity; was Future Point's name going to be mentioned? Charles had actually indicated some fear of that, and we went to see a lawyer about it at one time.
>
> But on this particular occasion, we were continuing to talk about that fear, that something could happen. And during that conversation with myself, Charles, Bill and Lamarr present, I'm certain those were the four, we talked about a lot of scenarios. Well, what if this happens; what if that happens? And in one of those scenarios, we talked about, what if we had to expel someone, and that precipitated about this possible scandal. And if that occurred, and if we also sold those shares, how would it work? How would you transfer the percentages of ownerships?
>
> And during that meeting as we all talked, we were just talking, but we all realized that we didn't really understand exactly how that would work. And this

> document [the Spreadsheet] was just trying to put it to paper. If it ever was decided to do something like this, this is the way it would work.

Mr. Wilder testified that on Wednesday, September 12, 2001, "I wanted to determine what I thought I needed to do to protect the company, and I called our CPA firm. That's the first place I turned. I really didn't know any attorneys." The accountant put Mr. Wilder in touch with a lawyer, Lewis Howard, Jr., who, Mr. Wilder testified "advised that, in order to avoid the potential vote to disburse the cash, that we should certainly disband the operating agreement and that those members who were supporting that kind of an action, that we should expel those members. And that is what I determined as well." Mr. Wilder testified that after speaking to Attorney Howard, he spoke with Mr. Freeman and Ms. Shockley who told Mr. Wilder they would support him and that they wanted out of FuturePoint.

When he was asked why he voted to expel Plaintiffs, Mr. Wilder stated:

> On Monday night, it was clear to me that Mr. Quade, Mr. Atkins, Mr. Thompson, were posing a threat to the company. And during that same meeting, it was also clear to me that Ms. Zimmerman and her husband supported that, because they did so verbally, vocally, as we debated/discussed and argued about whether that was a prudent thing to do.
>
> I considered Ms. Anderson and Mr. Martin, by the proxy and by Mr. Atkins' own assertions that they supported his tact as well. I thought that they had declared war, if you will, on the company. They were making an attack, and I did not think they deserved to remain as members because of that.

Attorney Lewis Howard, Jr. testified regarding his conversation with Mr. Wilder and the advice that Attorney Howard rendered. Mr. Howard stated:

> Under the Section 13.6 [of FuturePoint's operating agreement], by a majority vote of the members, members can be expelled from the limited liability company. I went through, you know, obviously, read the entire operating agreement. I went through and had some fairly lengthy discussions with Mr. Wilder about what was going on, who all the people were.
>
> And my understanding, based on that conversation, was that sort of the die had been cast, and it was kind of one group over here and another group on the other side that were diametrically opposed. And Mr. Wilder's group constituted a majority of the membership interest of the company, and therefore under the operating agreement, they had the ability to vote to expel members, and I advised them that they could do that under this agreement.

After trial, the Trial Court entered a Judgment in favor of Plaintiffs in accordance with the jury's verdict and awarded Plaintiffs damages of $76,624.00 plus pre-judgment interest of $22,271.36, for a total award of $98,895.36. Defendants had asked for a directed verdict at trial, which the Trial Court denied. After trial, Defendants filed another motion for directed verdict or in the alternative, for a new trial or to alter or amend the judgment, which the Trial Court also denied. Defendants appeal to this Court.

Discussion

Although not stated exactly as such, Defendants raise four issues on appeal: 1) whether the Trial Court erred in denying the motion for a directed verdict; 2) whether the Trial Court erred in denying a directed verdict in favor of Dee Dee Wilder, Anna Stout, and Kelly Welles; 3) whether the Trial Court erred in awarding pre-judgment interest; and, 4) whether the Trial Court erred in charging the jury such that Defendants are entitled to a new trial. Plaintiffs request this Court to hold this to be a frivolous appeal.

We first consider whether the Trial Court erred in denying the motion for a directed verdict as to all Defendants. Our Supreme Court discussed the standard under which an appellate court must review a motion for a directed verdict in *Johnson v. Tennessee Farmers Mut. Ins. Co.*, stating:

> In reviewing the trial court's decision to deny a motion for a directed verdict, an appellate court must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003). A motion for a directed verdict should not be granted unless reasonable minds could reach only one conclusion from the evidence. *Id*. The standard of review applicable to a motion for a directed verdict does not permit an appellate court to weigh the evidence. *Cecil v. Hardin*, 575 S.W.2d 268, 270 (Tenn. 1978). Moreover, in reviewing the trial court's denial of a motion for a directed verdict, an appellate court must not evaluate the credibility of witnesses. *Benson v. Tenn. Valley Elec. Coop.*, 868 S.W.2d 630, 638-39 (Tenn. Ct. App. 1993). Accordingly, if material evidence is in dispute or doubt exists as to the conclusions to be drawn from that evidence, the motion must be denied. *Hurley v. Tenn. Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995).

Johnson v. Tennessee Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. 2006).

Defendants' arguments in regard to this issue are, in essence, a reflection of Defendants' continuing belief that our Opinion in *Anderson I* was wrong. Directly contrary to our Opinion in *Anderson I*, Defendants continue to assert that no fiduciary duty is owed between members of a member-managed LLC, and, therefore, Defendants were not in breach of FuturePoint's operating agreement. In support of these assertions, Defendants state that *McGee v. Best*, "is the

better reasoned holding and should be dispositive of Plaintiffs' claims." *See McGee v. Best*, 106 S.W.3d 48 (Tenn. Ct. App. 2002). This argument was fully considered, and rejected, by this Court in *Anderson I*. *Anderson I*, 2003 Tenn. App. LEXIS 819. *Anderson I* clearly held that a majority shareholder of a LLC owes a fiduciary obligation to a minority shareholder. *Id. Anderson I* also held that each LLC member is required to discharge his or her duties in good faith. *Id*. The jury, after hearing all the proof presented in this case, found that Defendants had violated this fiduciary duty and their duty of good faith. Defendants do not argue that there is no material evidence to support these jury findings, but instead continue to argue only that *Anderson I* was wrongly decided and that there exists no such fiduciary duty or obligation of good faith. Defendants chose not to file a Rule 11 application for permission to appeal to our Supreme Court in *Anderson I*, and, therefore, *Anderson I* is the law of the case.

The record reveals, as discussed fully above, that the jury was presented with material evidence to support their verdict. There was no error in the Trial Court's denial of the motion for directed verdict. Defendants' arguments on this issue are without merit.

We next consider whether the Trial Court erred in denying a directed verdict in favor of Dee Dee Wilder, Anna Stout, and Kelly Welles. Defendants argue that "[n]o *evidence* was presented to even remotely suggest in what manner Defendants Dee Dee Wilder, Anna Stout, or Kelly Welles breached any alleged fiduciary duty owed to the Plaintiffs." Defendants are mistaken. The record reveals that Dee Dee Wilder, Anna Stout, and Kelly Welles each owned units jointly with their respective husbands and that those units were utilized to vote for the expulsion of Plaintiffs. Without the vote of these units to expel Plaintiffs, there would have been no expulsion of Plaintiffs. As discussed, material evidence was presented that supports the jury's verdict in regard to this issue. We, therefore, affirm the Trial Court's denial of a directed verdict in favor of Dee Dee Wilder, Anna Stout, and Kelly Welles.

We next consider whether the Trial Court erred in awarding pre-judgment interest. Our Supreme Court has stated:

> An award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion. This standard of review clearly vests the trial court with considerable deference in the prejudgment interest decision. Generally stated, the abuse of discretion standard does not authorize an appellate court to merely substitute its judgment for that of the trial court. Thus, in cases where the evidence supports the trial court's decision, no abuse of discretion is found.

Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998) (citations omitted). In *Scholz v. S.B. Int'l, Inc.*, this Court discussed awards of prejudgment interest stating:

> Parties who have been wrongfully deprived of money have been damaged in two ways. First, they have been damaged because they have not received the money to which they are entitled. Second, they have been damaged because they have been deprived of the use of that money from the time they should have received it until the date of judgment. Awards of pre-judgment interest are intended to address the second type of damage. They are based on the recognition that a party is damaged by being forced to forego the use of its money over time. Thus, our courts have repeatedly recognized that prejudgment interest is awarded, not to punish the wrong-doer, but to compensate the wronged party for the loss of the use of the money it should have received earlier.

Scholz v. S.B. Int'l, Inc., 40 S.W.3d 78, 82 (Tenn. Ct. App. 2000) (citations omitted).

The record on appeal fails to reveal "a manifest and palpable abuse of discretion" in the Trial Court's award of pre-judgment interest. *Myint*, 970 S.W.2d at 927. We will not substitute our judgment for that of the Trial Court on this issue. We affirm the grant of pre-judgment interest.

We next address whether the Trial Court erred in charging the jury such that Defendants are entitled to a new trial. Defendants argue that the Trial Court committed two specific errors in regard to the jury instructions.

First, Defendants assert that the Trial Court erred because instead of charging the jury with only one specific section of Tenn. Code Ann. § 48-240-102, the Trial Court read the majority of the statute. Defendants argue that "most of the language in the statute not related to advice of counsel was not supported by the evidence put before the jury."

We disagree and find no error in the Trial Court's reading to the jury other portions of the statute in addition to the single subsection requested by Defendants. Defendants' assertion that "most of the language in the statute…was not supported by the evidence put before the jury" ignores both our holding in *Anderson I*, which did make other portions of the statute particularly relevant to this case, and the evidence presented at trial as fully discussed above. Further, we note that even if it were error for the Trial Court to read more of the statute than specifically requested, such error here was harmless.

Second, Defendants argue that they submitted a proposed jury instruction that "track[ed] the language contained in the statute and was supported by sworn testimony at trial." The proposed jury instruction stated:

> If you find that the understanding of the parties to the Operating Agreement was that the members who hold a majority of units could expel any other member, or members, with or without cause, then you must find in favor of the Defendants.

The relevant portion of the statute states:

> (g) MODIFICATION OF STANDARD OF CONDUCT IN ARTICLES OR OPERATING AGREEMENT.
> Notwithstanding anything to the contrary in this section, the articles or operating agreement may define the standard of conduct in a manner to reflect the understanding of the parties provided such definition is not manifestly unreasonable under the circumstances.

Tenn. Code Ann. § 48-240-102 (g) (2002).

We note, first and foremost, the language in the proposed jury instruction does not track the statute as Defendants assert. The proposed jury instruction simply was an attempt to circumvent our clear ruling in *Anderson I.* The Trial Court correctly refused to give this proposed jury instruction.

Finally, we consider Plaintiffs' issue regarding whether this is a frivolous appeal. "'A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that [an appeal] can ever succeed.'" *Morton v. Morton*, 182 S.W.3d 821, 838 (Tenn. Ct. App. 2005) (quoting *Industrial Dev. Bd. of the City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995)). Exercising our discretion, we decline to hold this appeal frivolous.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellants, Brett Wilder, Dee Dee Wilder, Michael E. Cox, Dorman Lamarr Stout, Anna Stout, Timothy Welles, Kelly Welles, Dennis Freeman, and Rhonda Shockley, and their surety.

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D. MICHAEL SWINEY, JUDGE